BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **SIERRA PACIFIC INDUSTRIES** P. O. Box 1189 Arcata, CA 95521 Employer	DOCKET(S) 95-R2D3-4438 and 4439 **DECISION**

Background and Jurisdictional Information

Employer is a sawmill operator. Between October 11 and November 7, 1995, the Division of Occupational Safety and Health (Division), through Safety Engineer David J. Gauthier, conducted an accident inspection at a place of employment maintained by Employer at Samoa Blvd., Arcata, California (the site). On November 7, 1995, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1]:

Citation	Item	Section	Type	Penalty
1		3999(b) [Guarding belt conveyors]	Serious	$5,000
2		3314(a) [Cleaning, servicing and adjusting machinery]	Serious	$5,000

Employer has filed timely appeals contesting the existence of each violation and the reasonableness of each proposed civil penalty.

This matter was presented for hearing before James Wolpman, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Eureka, California, on January 23, 1997, at 11:30 a.m. Employer was represented by Scott Leiby, Safety and

[1] Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

Environmental Director. The Division was represented by David J. Gauthier. Oral and documentary evidence was introduced by the parties and the matter was submitted on January 23, 1997.

Law and Motion

At the hearing the Division moved to withdraw Citation 1 because it arose out of the same facts as Citation 2, and Citation 2 better reflects the nature of the alleged violative conduct. Good cause having been established, the motion was granted.

With respect to Citation 2, the parties stipulated that a ***prima facie*** case of a serious, accident related violation of § 3314(a) was established, subject only to Employer's contention that it was excused because the violative conduct was due to an independent employee act. The parties therefore agreed that the evidence presented would be confined to an affirmative defense.

Docket 95-R2D3-4439

Citation 2, Serious, § 3314(a)

Summary of Evidence

Employer was cited for failing to de-energize and lock out a conveyor used to move wood chips. Because an employee was injured the violation was alleged to be accident related.

The injured employee, Jonathan Eacret, was standing by, watching as the conveyer belt was being moved into position so that it could be repaired. Although maintenance employees had earlier cleared away most of the chips, he noticed that a few were still lodged under the tail of the belt and reached in to clear them away. As he did so, the supervisor in charge of the repair work signaled the operator to "jump" the belt forward so that he could reach the damaged area. Eacret's hand was pulled into the belt mechanism, resulting in a serious injury.

Employer conceded that the conveyor had not been locked out, but offered evidence to establish, by way of affirmative defense, that the injury was due to an independent employee act.

Findings and Reasons for Decision

EMPLOYEES WERE ENGAGED IN SERVICING THE CONVEYOR AT THE TIME

OF THE ACCIDENT. TO DO SO, IT WAS NECESSARY FOR THE CONVEYOR TO REMAIN OPERABLE.

THE EMPLOYEE INJURED WHEN HE FAILED TO UTILIZE AN EXTENSION TOOL TO CLEAR THE BELT OF THE CONVEYOR WAS AN EXPERIENCED WORKER WHO KNEW HE WAS ACTING CONTRARY TO EMPLOYER'S WELL ESTABLISHED AND EFFECTIVELY ENFORCED SAFETY PROGRAM.

THE APPEAL IS THEREFORE GRANTED AND THE PROPOSED PENALTY IS SET ASIDE.

The evidence establishes that maintenance supervisor Sal Cabrera and maintenance worker Larry Bednar were called near the end of day shift on October 3, 1995, to repair a torn belt on the Chip Overs Conveyor Tail Sheave. In preparation for the repairs, they used extension tools to clear away most of the chips which had accumulated around the tail of the conveyor. About that time, Eacret, an employee who performed general cleanup work, came over to watch.

The machine had not yet been de-energized and locked out because it was necessary for the operator to position the belt so the damaged portion would be accessible. Cabrera testified that he told both Eacret and Bednar to stand clear while the operator "jumped" the belt forward. Eacret is hard of hearing but, according to Cabrera, he appeared to understand the warning because he stepped back. Eacret himself does not specifically recall Cabrera's warning but acknowledged that it may well have been given and that "it seems" like he moved back. He also acknowledged that he was well aware the conveyer had not yet been de-energized or locked out.

Cabrera then had the operator jump the belt forward several times. After the first or second jump, Eacret noticed some chips lodged beneath the tail of the conveyor. He moved forward, lifted the hinged screen guard protecting the area (Exhibits 3, G, H and I) and reached under the belt to clear them away. As he did so, the operator, acting on Cabrera's signal, again jumped the belt, catching his hand. The resulting injuries were serious, requiring hospitaliz-ation in excess of 24 hours.

Employer was cited for a violation of § 3314(a) which requires that machinery capable of movement be stopped and the power source be de-

energized and, if necessary, locked out to prevent inadvertent movement during cleaning, adjusting or servicing operations. Although the section does not specifically mention repairs — and § 3314(b) does — the Board has held that repair work of a routine nature constitutes a "servicing operation" (***Lights of America***, OSHAB 89-400, Decision After Reconsideration (Feb. 18, 1991).) In view of that and in view of the stipulation of the parties that the facts established a ***prima facie*** violation of § 3314(a), that section is applicable to the case at hand.

The section contains an exception which allows machinery to remain energized where, as here,[2] it must be capable of operation to perform necessary cleaning, adjusting and servicing. To avail itself of the exception an employer must, however, take certain precautions:

> "[T]he employer shall minimize the hazard of movement by providing and requiring the use of extension tools or other methods or means to protect employees from injury due to movement. Employees shall be made familiar with the safe use and maintenance of such tools by thorough training."

Although the two maintenance employees had used extension tools when they cleared the chips from the tail area, Eacret did not.

Employer presented evidence that his failure to do so was independent employee act for which it was not responsible.

To establish the independent employee action defense, an employer must prove, by a preponderance of the evidence, each of the elements of the defense: (1) that the employee was experienced in the job being performed; (2) that the employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments; (3) that the employer effectively enforces its safety program; (4) that the employer has a policy which it enforces of sanctions against employees who violate the program; and (5) that the employee who committed safety infraction knew s/he was acting contrary to the employer's safety requirements. (***Mercury Service, Inc.***, OSHAB 77-1133, Decision After Reconsideration (Oct. 18, 1980; ***Central Coast Pipeline Construction Company, Inc.***, OSHAB 76-1342, Decision After Reconsideration (July 16, 1980).)

The Division did not question the abundant evidence which Employer presented to establish that Eacret was an experienced

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[2] It may well be that, once the belt was correctly positioned, it would have been proper to de-energize and lock out the conveyor, but that stage had not yet been reached when the accident occurred.

employee, that employer has a well devised safety program, and that it takes disciplinary action against employees who violate safety rules. (Exhibits A, B, C & D.) It did, however, question whether Eacret knew he was acting contrary to Employer's safety requirements when the reached under the tail of the conveyor to clear away the remaining chips and whether its safety program was effectively enforced during the cleaning and adjustment of the chip conveyer.

Eacret admitted, both in his sworn testimony and in the recorded statement he gave to the inspector (Exhibit E, pp. 4-6), that he was aware that the conveyor was energized and that he knew it was against the rules to reach in, as he did, to clear away chips. Indeed, he had been present at a safety meeting a week before his accident where that issue was specifically discussed. (Exhibit A, pp. 4 & 9.)

As for the effective enforcement of the program, I accept supervisor Cabrera's testimony that he told both Eacret and Bednar to stand clear and that Eacret responded by stepping back from the conveyor. His testimony was clear and direct. Eacret did not challenge its truthfulness, but said only that he had no clear recollection of what was said. Finally, it should be noted that the screen guard at the tail of the conveyor remained in place until Eacret lifted it to reach in.

I therefore conclude that Employer established all of the elements of the independent action defense and that its appeal should therefore be granted and the proposed penalty set aside.

DATED: February 21, 1997

JAMES WOLPMAN
Administrative Law Judge